

1961

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## Recommended Citation

Bernard D. Meltzer, "The Supreme Court, Arbitrability and Collective Bargaining," 28 University of Chicago Law Review 464 (1961).

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## THE SUPREME COURT, ARBITRABILITY AND COLLECTIVE BARGAINING\*

BERNARD D. MELTZER†

*A man does not show his greatness by being at one  
extreme, but rather by touching both at once.*—PASCAL

IN THREE significant cases decided last term, the Supreme Court considered for the first time an old and slippery problem—the proper judicial approach to disputes concerning the jurisdiction of arbitrators under collective bargaining agreements. These cases arose under Section 301 of the LMRA,<sup>1</sup> which in *Lincoln Mills*<sup>2</sup> had been interpreted as a mandate to federal courts to give specific enforcement to agreements for grievance-arbitration and to fashion a body of substantive law for all actions under that section for breach of labor agreements. In two of the cases,<sup>3</sup> the union had sought to compel arbitration by an unwilling employer; in the third,<sup>4</sup> enforcement of an arbitration award. In each of the cases, the Court, reversing the judgment below, sustained the arbitrator's competence.<sup>5</sup> The Court used these cases as

\* This paper was delivered at a meeting of the Labor Law Committee of the Chicago Bar Association, on October 11, 1960. After that talk, Professor Hays' valuable article, *The Supreme Court and Labor Law, October Term, 1959*, 60 COLUM. L. REV. 901 (1960), appeared. His appraisal of the arbitration cases (at pp. 919–34) is, in general, similar to that presented below.

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<sup>1</sup> 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

<sup>2</sup> *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

<sup>3</sup> *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

<sup>4</sup> *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>5</sup> Challenges to arbitral authority include: (1) those urging that the subject matter of a grievance renders it non-arbitrable; (2) those urging that arbitration is blocked by the moving party's failure to meet procedural prerequisites such as time limitations prescribed by, or inferred from, the agreement; and (3) those questioning the remedy requested from, or awarded by, the arbitrator.

The first two kinds of objections are sometimes said to involve "arbitrability," and the third, "jurisdiction." "Jurisdiction" is, however, broad enough to encompass all three classes; furthermore, the nature of the challenge is generally made clear by the specific dispute. Hence, the foregoing distinction does not seem a useful one and will not be followed below.

Denials of arbitrability based on the subject matter of grievances may be further broken down into those asserting that: (1) the subject matter of a grievance was excluded from arbitration; (2) a grievance is so "unconscionable" or "frivolous" that it is not arbitrable even though it falls within the literal scope of an arbitration clause; and (3) a grievance involves a matter beyond the scope of the agreement. The feasibility of efforts to distinguish between sub-categories (2) and (3) is discussed in the text, commencing at note 45 *infra*.

the vehicle for announcing sweeping rules for judicial determination of arbitral authority. These rules sharply limit the judicial function in cases involving the arbitrator's jurisdiction and impose a heavy burden on a party contesting such jurisdiction. Correlatively, they recognize a broad arbitral jurisdiction over grievances and remedies therefor unless an arbitration clause is restricted by specific limitations.<sup>6</sup> Furthermore, under the view announced by the concurring Justices<sup>7</sup> even such limitations may not foreclose jurisdiction because they may be overridden by implied obligations of good faith.

The Court justified its approach as a fair interpretation of the parties' bargain, but it found additional and important support in what it considered to be the national labor policy and the distinctive aspects of labor agreements and of labor arbitration.<sup>8</sup> This paper will be concerned primarily with the basis for the Court's general approach and its implications for the duty to bargain.

The first case, *American Manufacturing*, arose from the employer's refusal to reinstate an injured employee shortly after the settlement of his claim for workmen's compensation.<sup>9</sup> In the settlement discussions, the employee's doctor had asserted that the employee had suffered a permanent disability of twenty-five per cent. Several weeks after the settlement, the union had requested reinstatement on the basis of a contractual provision calling for employment and promotion on the basis of seniority "where ability and efficiency are equal." The agreement also contained a "standard form" of arbitration clause (providing for arbitration of any differences "as to the meaning, interpretation and application of the provisions of this agreement") and a no-strike clause.<sup>10</sup> The employer, after denying the grievance, had refused to arbitrate.

In the union's action to compel arbitration, the federal district court had entered a summary judgment for the employer on the ground that the employee's acceptance of a settlement based on his claim of partial permanent

<sup>6</sup> See text accompanying notes 28-29 *infra*.

<sup>7</sup> See note 32 *infra*.

<sup>8</sup> See text accompanying notes 2 *supra* and 66 *infra*.

<sup>9</sup> The court order approving the settlement mentioned, but made no findings concerning, the dispute as to the extent of disability. *United Steelworkers v. American Mfg. Co.*, 264 F.2d 624, 625 (6th Cir. 1959).

<sup>10</sup> The arbitration clause also contained a familiar provision denying the arbitrator "authority to add to, subtract from, or modify the terms of the agreement," and provided for finality of awards. The agreement also contained the following management-rights clause: "The Management of the works, the direction of the working force, plant layout and routine of work, including the right to hire, suspend, transfer, discharge or otherwise discipline any employee for cause, such cause being: infraction of company rules, inefficiency, insubordination, contagious disease harmful to others, and any other ground or reason that would tend to reduce or impair the efficiency of plant operation; and to lay off employees because of lack of work, is reserved to the Company, provided it does not conflict with this agreement. . . ." 363 U.S. at 565 nn.1 & 2.

disability had estopped him from claiming any seniority or employment rights. The Sixth Circuit, although conceding that the dispute was covered by the arbitration clause, had affirmed on a different ground—that the grievance was “frivolous, patently baseless. . . .”<sup>11</sup> In reaching that conclusion the court had reviewed, and relied on, the evidence concerning both the grievant’s physical condition and the employer’s contention that the grievant was disabled from performing any open job.

Reversing, the Supreme Court, by Mr. Justice Douglas,<sup>12</sup> emphasized the following considerations: Section 203(d) of the LMRA expresses a national policy in favor of voluntary grievance-arbitration.<sup>13</sup> That policy calls for “full play” for the means of adjustment chosen by the parties.<sup>14</sup> It calls also for a rejection of the *Cutler-Hammer* doctrine,<sup>15</sup> which had been invoked by the Sixth Circuit. *Cutler-Hammer* had declared: “If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.”<sup>16</sup> That doctrine, said Mr. Justice Douglas, “could only have a crippling effect on grievance arbitration.”<sup>17</sup> Furthermore, it rewrites the standard arbitration clause which calls for the submission of “all grievances to arbitra-

<sup>11</sup> *United Steelworkers v. American Mfg. Co.*, 264 F.2d 624, 628 (6th Cir. 1953).

<sup>12</sup> Mr. Justice Frankfurter concurred in result and also joined the concurring “observations” of Justices Brennan and Harlan. Mr. Justice Whittaker wrote a brief and separate concurrence, stating that “the District Court lacked jurisdiction to determine the merits of the claim which the parties had validly agreed to submit to the exclusive jurisdiction of a ‘Board of Arbitrators’ . . .” 363 U.S. at 569, 573.

<sup>13</sup> *Id.* at 566.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Id.* at 566-67.

<sup>16</sup> *Id.* at 567. In *Cutler-Hammer*, the union had demanded arbitration concerning the payment of a bonus under a clause providing that the employer would “discuss” such a payment with the union. Judge Fuld, dissenting from an affirmance of the refusal to compel arbitration, had urged that the meaning of the clause was not beyond dispute, but had accepted the majority’s principle that a claim may be “so unconscionable” as to justify judicial refusal to compel arbitration. *International Ass’n of Machinists v. Cutler-Hammer, Inc.*, 297 N.Y. 519, 520, 74 N.E.2d 464 (1947).

<sup>17</sup> 363 U.S. at 567. Query: Would this sweeping charge be substantiated by experience in New York under *Cutler-Hammer*? Has arbitration been meaningfully less serviceable in New York than elsewhere? Have the New York courts been flooded with cases arising from management’s unwillingness to arbitrate? Have unions resisted no-strike clauses because of fears of judicial encroachment on arbitral autonomy? If so, has any resultant difficulty been neutralized by increased receptivity of employers to broad arbitration clauses resulting from the protection against “frivolous” claims held out by *Cutler-Hammer*?

I have not investigated these questions, but I doubt that investigation would support Justice Douglas’ charge. The important contribution of arbitration to labor-management relations (so eloquently stressed by the Justice) suggests that the acceptance or rejection of *Cutler-Hammer* or, indeed, of judicial enforceability would have only a peripheral impact on arbitration’s usefulness. Cf. the discussion accompanying note 47 and following note 93 *infra*.

tion, not merely those that a court may deem to be meritorious." The merits are no business of courts.<sup>18</sup>

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for. . . . The agreement is to submit all grievances to arbitration, not merely those which the courts will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.<sup>19</sup>

The meaning of these observations is made crystal clear by Mr. Justice Brennan's concurring opinion:

[The] Court finds that the meaning of that "standard" clause is simply that the parties have agreed to arbitrate any dispute which the moving party asserts to involve construction of the substantive provisions of the contract, because such a dispute necessarily does involve such a construction.<sup>20</sup>

Thus, as the Court's citation of the *New Bedford* case<sup>21</sup> suggests, a grievance is to be held arbitrable if it claims a contract violation even though the grievance on its face appears plainly (to a court) repugnant to the contractual provisions. To be more specific, the Court's general approach implies that the demand in *American Manufacturing* would have been arbitrable even though

<sup>18</sup> *Id.* at 568. In support of this proposition, the Court cited *New Bedford Defense Prods. Div. v. Local 1113*, 258 F.2d 522, 526 (1st Cir. 1958), which approved Judge Wyzanski's declaration: "Issues do not lose their quality of arbitrability because they can be correctly decided only one way." Other decisions by the First Circuit involve, however, a rather active flirtation with an approach not easy to distinguish from *Cutler-Hammer*. See *Local 201, Int'l Union of Elec. Workers, AFL-CIO v. General Elec. Co.*, 262 F.2d 265 (1st Cir. 1959); *Local No. 149, Am. Fed'n of Technical Eng'rs v. General Elec. Co.*, 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958), criticized in Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1512 (1959); *cf.* Wellington, *Judge Magruder and the Labor Contract*, *id.* at 1268, 1292-94. See note 41 *infra* and accompanying text. See also *Newspaper Guild of Boston v. Boston Herald-Traveler*, 238 F.2d 471 (1st Cir. 1956). For a survey of federal cases dealing with questions of arbitrability under section 301, see Note, *Judicial Determination of Arbitrability*, 10 SYRACUSE L. REV. 278 (1959).

<sup>19</sup> 363 U.S. at 567-68. The Court ignores that flooding the grievance-arbitration procedure with "frivolous" claims may prevent the orderly adjustment of genuine claims and may pervert adjustment mechanisms into pressure devices. See SLICHTER, HEALY & LIVENASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 674 (1960). *But cf.* Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 261 (1958), cited 363 U.S. at 568 n.6. It should be noted that employers, by calculated obstructionism, may also interfere with orderly adjustment. Regardless of whether sound generalization about the values and costs of "frivolous" grievances is possible, it seems clear that the courts cannot furnish effective protection against the deliberate overloading of the grievance-arbitration process.

<sup>20</sup> 363 U.S. at 571.

<sup>21</sup> *New Bedford Defense Prods. Div. v. Local 1113, UAW*, 258 F.2d 522 (1st Cir. 1958).

substantive provisions of the agreement had expressly excluded reinstatement rights to employees who had suffered a prescribed percentage of disability and the union had conceded the existence of that percentage. *American Manufacturing* did not, of course, involve so extreme a situation. Indeed, the Court, as Mr. Justice Whittaker's dissent makes clear, could have supported its result on much narrower grounds: that the lower courts had encroached on the jurisdiction of the arbitrator to take evidence and to appraise the merits of a claim which on its face was wholly compatible with the agreement.

The second case, *United Steel Workers v. Warrior & Gulf Navigation Co.*,<sup>22</sup> presented a more troublesome problem than *American Manufacturing*; it arose from a grievance protesting the sub-contracting of certain maintenance work. According to the Court, this sub-contracting had been a factor in reducing the number of employees by almost one-half during a two-year period. The employer had, however, been engaged in such sub-contracting for many years. Furthermore, in successive negotiations, including those preceding the governing agreement, the union had unsuccessfully tried to negotiate contractual limitations on sub-contracting. Although the dissenting opinion stressed this history, the Court passed over it in silence and referred only to the provisions of the agreement. These included: (1) a no-lockout provision—the clause, according to the union, which had been violated by the sub-contracting; (2) a no-strike clause; and (3) an inartistically drafted grievance and arbitration clause providing in part as follows:

Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner. . . .<sup>23</sup>

<sup>22</sup> 363 U.S. 574 (1960).

<sup>23</sup> *Id.* at 576. The Court intimated that this clause did not restrict arbitration to questions involving the "meaning or application" of the contractual provisions: "To be sure the agreement provides that 'matters which are strictly a function of management shall not be subject to arbitration.' But it goes on to say that if 'differences' arise or if 'any local trouble of any kind' arises, the grievance procedure shall be applicable." *Id.* at 583. The Court's literal reading ignores a familiar difference between the scope of the grievance process and of arbitration respectively. Thus, the grievance procedure may cover "any dispute" while arbitration may be more limited. Otherwise, arbitration, activated by "any dispute," (or by any "local trouble") would threaten stability by permitting an arbitrator to rewrite the agreement.

The apparent exclusionary thrust of the clause quoted in the text might be avoided on the ground that "management rights" consist only of those rights not expressly or impliedly limited by the agreement. Consequently, "local troubles" are arbitrable only if they assert a violation of the agreement. See Union's Brief for Appellant, pp. 62-63. But that reasoning presupposes a most oblique method for delineating a familiar arrangement for a broad grievance procedure and a narrower arbitral jurisdiction, and deletes the exclusion on arbitration from the agreement provided only that the union is willing to assert a contract violation, no matter how fanciful.

The agreement then prescribed as the settlement mechanism a conventional grievance procedure, culminating in arbitration, and provided that the arbitral award should be final. The Court held that the unwilling employer should have been compelled to arbitrate the sub-contracting grievance.

In doing so, it announced a set of comprehensive rules for judicial determination of questions of arbitrability:

(1) "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute he has not agreed so to submit."<sup>24</sup>

(2) Whether such agreement exists "is for the court to decide."<sup>25</sup> A party urging that arbitrability is to be decided by the arbitrator "must bear the burden of a clear demonstration of that purpose."<sup>26</sup>

(3) But an even greater burden rests on the defendant in an action to compel arbitration. He loses "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."<sup>27</sup> The Court intimated, however, that this burden in some situations might be lightened or discharged by a clause expressly excluding specified matters from arbitration:

*In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.*<sup>28</sup>

"Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement."<sup>29</sup> This is so because "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement."<sup>30</sup>

Before looking more closely at the Court's rules and their internal consistency, it is useful to describe how they were applied in *Warrior*. The Court

<sup>24</sup> 363 U.S. at 582.

<sup>25</sup> *Id.* at 583 n.7. The Court limited this statement to agreements such as those involved in *Warrior* and *Enterprise*. But even where an agreement clearly authorizes the arbitrator to determine his jurisdiction, the issue raised by a refusal to proceed to arbitration remains a judicial question, which, however, is easy to answer. Whatever the content of the arbitration clause, the court must decide whether there has been a breach of a promise to arbitrate either the merits of a claim or the scope of the arbitrator's jurisdiction.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Id.* at 582-83.

<sup>29</sup> *Id.* at 581.

<sup>28</sup> *Id.* at 584-85. (Emphasis added.)

<sup>30</sup> *Ibid.*

restricted its inquiry to the words of the agreement and gave decisive effect to the absence of a provision that all forms of sub-contracting were a "management function."<sup>31</sup> This approach, as Mr. Justice Whittaker's dissent suggested, excluded considerations sharply relevant to the parties' purposes. Thus, the bargaining and operating history might reasonably have been read as the equivalent of an express provision that sub-contracting was a management right, and especially so, given the Court's emphasis on the desirability of placing the words of a labor agreement in their total context. The Court's eloquent silence concerning the historical context implies that judicial determination of its significance would have involved an improper intrusion into the merits. This implication provoked an expression of uneasy doubt in the concurring opinion:

In contrast to *American* . . . the arbitration promise here excludes a particular area from arbitration. . . . Because the arbitration promise is different, the scope of the Court's inquiry may be broader. Here, a court may be required to examine the substantive provisions of the contract to ascertain whether the parties have provided that contracting out shall be a "function of management." If a court may delve into the merits to the extent of inquiring whether the parties have expressly agreed whether or not contracting out was a "function of management," why was it error for the lower court to evaluate the evidence of bargaining history for the same purpose? Neat logical distinctions do not provide the answer.<sup>32</sup>

The only answer given by the Court is a rule of thumb: Only a specific exclusion clause will be adequate to limit the scope of a standard arbitration clause. But, as already indicated, this mechanical rule obviously ignores the history of the relationship which may be the most telling evidence of the parties' purposes. The Court's method in *Warrior* is thus obviously difficult to square with its recognition of the consensual nature of arbitration and of judicial competence over questions of arbitrability. Indeed, where a general exclusion clause is not given more specific content by other contractual provisions,<sup>33</sup> the Court's approach in effect deletes such a clause.

<sup>31</sup> The Court also pointed to the absence of any showing that the parties had that purpose. It is not easy to follow the Court here: Apparently, its meaning is that the agreement as a whole did not indicate managerial freedom to sub-contract. The Court's silence about the bargaining and operating history strongly suggests that the required showing must appear from the face of the agreement; this interpretation was made explicit by the concurring opinion. See text accompanying note 32 *infra*.

<sup>32</sup> *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 572 (1960). The concurring opinion justified the result in *Warrior* on the following grounds: "On the basis of inconclusive evidence . . . [the lower courts] found that *Warrior* was in no way limited by any implied covenants of good faith and fair dealing from contracting out as it pleased—which would necessarily mean that *Warrior* was free completely to destroy the collective bargaining agreement by contracting out all the work." *Ibid*.

<sup>33</sup> The management-rights clause in *Warrior*, 168 F. Supp. 702, 704 (S.D. Ala. 1958), provided: "The management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to



Although the Court explicitly disclaimed any intention to treat the general clause "as mere surplusage,"<sup>34</sup> that disclaimer is put into question by the language which immediately follows it:

"Strictly a function of management" might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge. But if courts, in order to determine arbitrability, were allowed to determine what is permitted and what is not, the arbitration clause would be swallowed up by the exception. Every grievance in a sense involves a claim that management has violated some provision of the agreement.

Accordingly, "strictly a function of management" must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion.<sup>35</sup>

In other words, a general exclusion clause is wholly ineffective unless it is coupled with a specific substantive provision recognizing management's unfettered control over the subject matter of the grievance. Furthermore, the Court cast some doubt on whether even such a combination of clauses would be ineffective to bar arbitration; for the Court, in the next to the last paragraph of *Warrior*, declared that the principle announced in *American Manufacturing* was controlling:

"The grievance alleged that the contracting out was a violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration."<sup>36</sup>

This declaration is, however, irreconcilable with the Court's earlier statement that arbitration should be denied where a general exclusion clause is coupled with a provision specifically reserving management control over the subject matter of the grievance. And that statement in turn is inconsistent with the Court's admonition to the lower courts to abstain from considering the merits. Nevertheless, the Court's opinion as a whole suggests a qualification on that admonition when the merits, *i.e.*, the meaning of substantive provisions, are involved in determining the applicability of exclusion clauses.

That qualification, together with the Court's bow to the consensual nature of arbitration, poses a troublesome question: Should a court faced with an issue of arbitrability give decisive effect to a clause or a combination of

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relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union." The bargaining and negotiating history was strong evidence that sub-contracting was a "legitimate reason" for layoff.

<sup>34</sup> 363 U.S. at 583-84.

<sup>35</sup> *Id.* at 585. It should be noted that the Court was concerned only with the issue of arbitrability; thus its observations should not be read as a rejection of the controversial "reserved rights" theory insofar as adjudication on the merits is concerned.

<sup>36</sup> *Id.* at 585.

clauses excluding certain matters from arbitration and yet ignore a substantive provision which with equal clarity and specificity places the same matters within the employer's prerogative? These two kinds of clauses share a common substantive purpose—the recognition of the employer's freedom of action in the area involved. The exclusionary clause implies such freedom no less than the substantive provision because the former provision must be read in the light of the entire agreement. Thus, the exclusionary provision, together with the absence of any substantive limitations in the excluded area, contrasted with the presence of such limitations in other areas, would normally imply managerial freedom in the excluded area.

The identity of substantive purposes in the two situations does not, however, involve a corresponding identity of purpose with respect to the availability of arbitration for determining whether there has been a breach of agreement. A specific exclusion from the arbitration clause must be read as reflecting the common purpose of denying arbitral jurisdiction in the excluded area. By contrast, a substantive provision may be designed solely to provide the arbitrator with a guide for decision and not to oust him of jurisdiction.

The parties' purposes are, however, far more elusive than is suggested by this explanation, which lies behind the familiar criticisms of *Cutler-Hammer*. The dominant criticism,<sup>37</sup> echoed by the Court, is that *Cutler-Hammer* rewrites "all disputes" as to contract interpretation into "all meritorious disputes," etc. But what of a judicial interpretation which reads "all disputes" as "all good-faith disputes"? Such an interpretation would be in the classic tradition; it would merely require courts to condition arbitration on compliance with the good-faith principle which pervades the general law of contract and which has been given generous scope in interpreting the substantive provisions of labor agreements. It is true that an attempt to apply that principle to disputes over arbitral jurisdiction would involve substantial difficulties for the courts and substantial risks of judicial encroachment on a voluntary adjustment system. But such risks are inherent in any application of the good-faith principle. More important, insofar as we are looking for the parties' purposes, the weighing of such risks is, as Judge Magruder has emphasized,<sup>38</sup> for the parties and not for the courts.

The difficulty with reliance on consensus is a familiar one. The parties, if they have thought about the role of the courts, are likely to have discordant purposes, reflecting differing fears and hopes with respect to arbitration. The

<sup>37</sup> See, e.g., Summers, *Judicial Review of Arbitration*, 2 BUFFALO L. REV. 1, 9-13 (1952); Cox, *supra* note 18. But cf. Herzog, *Judicial Review of Arbitration Proceedings—A Present Need*, 5 DE PAUL L. REV. 14 (1955); Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519 (1960).

<sup>38</sup> See Local 149, Am. Fed'n of Technical Eng'rs v. General Elec. Co., 250 F.2d 922, 927 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).

union, which is usually the moving party, normally is opposed to judicial limitations on arbitration—the principal means for challenging managerial conduct during the contract term. Management, although cognizant of the values of arbitration, is fearful of activist arbitration which may exceed the leeway for interpretation and create new obligations under the guise of enforcing old ones. Such fears, which are the staples of the law, loom larger in the labor arbitration context because, as in the case of insurance and some other commercial agreements, activism generally is to the advantage of one side. Under the foregoing circumstances, the imputation of a universal consensus—for the broad diversity of relationships involved—is a familiar fiction, which is unlikely to mislead even those who use it.

Although the Court paid lip-service to that fiction, its opinions suggested that the controlling consideration behind its unqualified repudiation of *Cutler-Hammer* was the fear of unsympathetic and uninformed judicial encroachment on a private system of adjustment. Experience under the *Cutler-Hammer* doctrine, as other observers have emphasized,<sup>39</sup> gave substance to that fear and support for the Court's rejection of that doctrine.

The dangers of *Cutler-Hammer* were, however, the inescapable price for the protection it was designed to provide, *i.e.*, against "unconscionable" or outrageous results by specialized tribunals. Judicial protection against such results brings acceptability, as well as risk, to the arbitration system; the parties, and employers especially, sometimes find that system more acceptable when it is subjected to judicial checks.<sup>40</sup> The desire for such protection is, moreover, linked with the broader tradition reflected in judicial control over administrative and jury determinations. In labor arbitration, as elsewhere, courts, to avoid "outrages" by others, would undoubtedly commit their own. A fair assessment of the competing dangers involves obvious difficulties. But it is clear that such an assessment will not result from headlining judicial lapses and ignoring those of arbitrators. Such one-sidedness will instead lead to the extravagant treatment of labor arbitration which, as we will see, entered into the Court's decisions. In any event, *Lincoln Mills* gives an ironic twist to the Court's view that labor arbitrators are giants in dealing with the exotic mysteries of the labor agreement, while even the best courts are dwarfs. It is strange that courts, competent to fashion a new law for the labor agreement, are so unqualified to deal with the "merits" of grievances that they cannot be trusted to enforce a pervasive obligation of good faith in the context of controversies over arbitrability.

It is perhaps the pervasiveness of both the good-faith tradition and of judicial review which makes it easier to write an epitaph for *Cutler-Hammer* than

<sup>39</sup> See Summers, *supra* note 37; Cox, *supra* note 18.

<sup>40</sup> See Levi, *An Evaluation of Labor Arbitration*, 8 LAB. L.J. 529, 530 (1957).

to keep it buried. Thus, the First Circuit, after rejecting *Cutler-Hammer*, seems on occasion to have resurrected it.<sup>41</sup> Furthermore, in a valuable essay, Professor Cox (whose insights were selectively invoked by the Court in the *Warrior* case),<sup>42</sup> after generally condemning *Cutler-Hammer*, also suggested that it should be preserved in a limited sphere: "[A]rbitration should be ordered . . . whenever the claim might fairly be said to fall within the scope of the collective-bargaining agreement. If the latter contention be made but is patently frivolous, arbitration should be denied."<sup>43</sup> The underlying distinction, which Cox seems to be suggesting, appears to be between a claim which, although frivolous, is regulated by the agreement and a frivolous contention that a grievance falls within the agreement. A similar distinction has been suggested by Judge Magruder, as I read him.<sup>44</sup>

The difficulty of administering such a distinction is suggested by academic criticism of its application by Judge Magruder.<sup>45</sup> Several hypothetical cases may clarify the difficulties. Suppose a contract with a recognition clause and a standard arbitration clause is silent about sub-contracting. Is a claim that sub-contracting violates the recognition clause "within the scope of the collective bargaining agreement"? If so, isn't it because the claim based on the recognition clause should not be held to be plainly frivolous, *i.e.*, because the application of *Cutler-Hammer* should not block arbitration? Or, suppose that a contract is silent about plant relocation. Is a grievance alleging that plant removal is a violation of the recognition clause non-arbitrable on the ground

<sup>41</sup> See, *e.g.*, *Local 201, Int'l Union of Elec. Workers, AFL-CIO v. General Elec. Co.*, 262 F.2d 265 (1st Cir. 1958). The court found non-arbitrable a grievance protesting that the transfer of a senior employee to an identical job on the "lobster shift," in connection with a reduction in force, violated the seniority clause. The arbitration clause was standard except that it expressly permitted a judicial test of the arbitrability of an alleged contract violation. The court declined to give conclusive effect to the union's claim that the seniority clause had been violated, stating: "The court must be satisfied that this claim is well-founded, that is, that the arbitrator can use those provisions as a controlling statute to decide the merits of the grievance." *Id.* at 271. The court was not so satisfied because it read "transfer," for seniority purposes, as not including the disputed assignment. It reinforced this textual interpretation by considerations outside the agreement and also noted that arbitrators, under similar agreements, had rejected similar claims on the merits. *Id.* at 272. See also *Local 149, Am. Fed'n of Technical Eng'rs v. General Elec. Co.*, 250 F.2d 922, 924 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).

<sup>42</sup> See, *e.g.*, 363 U.S. at 579-80.

<sup>43</sup> Cox, *supra* note 18, at 1516, which supports the foregoing suggestion by analogy to *Bell v. Hood*, 327 U.S. 678 (1946). In that case, the Court, in finding federal jurisdiction, emphasized that the substantive claim based on alleged violations of the federal constitution was not "patently without merit." It is difficult to see how the analogy to *Bell v. Hood* would aid the federal courts to solve the central issue raised by *Cutler-Hammer*—the extent to which the merits of a grievance may be considered by the courts. Indeed, it is arguable that *Bell v. Hood*, assuming *arguendo* that it is an appropriate analogy, supports *Cutler-Hammer* without qualification.

<sup>44</sup> See note 41 *supra*.

<sup>45</sup> Wellington, *supra* note 18, at 1289; Cox, *supra* note 18, at 1512-13.

that relocation cannot reasonably be said to be within the scope of the agreement? Would such a claim, nevertheless, become arbitrable if the agreement explicitly sanctioned relocation, since such a provision would bring the disputed matter within the scope of the collective bargaining agreement? If the answer is "yes," the suggested formula would produce this anomaly: The more "frivolous" a grievance on its face, *i.e.*, the more clearly its merits are denied by the agreement, the stronger the case for arbitrability. If the answer is "no," it is difficult to know what is meant by the key phrase in Cox's formula—"within the scope of the collective bargaining agreement."

The basic difficulty with a partial repudiation of *Cutler-Hammer* is, I believe, that every claim pressed as arbitrable is in one sense "within the scope of the collective agreement" in that any claim, whether it is meritorious, marginal or frivolous, is governed by the agreement. But this truism leads only to the approach in *American Manufacturing*, which is a corollary of the unqualified rejection of *Cutler-Hammer*. A less sweeping rejection would, as already indicated, involve a judicial inquiry as to whether the subject involved in the union's grievance may fairly be said to have been regulated by the contract read in the light of the relevant context. If the court finds such contractual regulation, the interpretation of the regulation is left to the arbitrator; if the court does not make such a finding, the grievance would be held non-arbitrable under a standard arbitration clause. But such a judicial inquiry necessarily calls for an interpretation of the reach of the substantive provisions of the agreement. And it is such substantive interpretation which the critics of *Cutler-Hammer* have condemned. Indeed, the decision in *Cutler-Hammer* itself<sup>46</sup> could be defended on the ground that the union's demand for a bonus payment was not fairly within the scope of a provision requiring *discussion* of a bonus and that the union's demand was, accordingly, not arbitrable.

The forgoing considerations suggest that *Cutler-Hammer* must be completely accepted or completely rejected. Any attempt at qualified rejection would produce anomalous results and, like the acceptance of *Cutler-Hammer*, would inevitably involve courts in the merits. The Court in *American Manufacturing*, without explicitly considering a qualified rejection, seems to have completely repudiated *Cutler-Hammer* by unqualifiedly condemning judicial appraisal of the merits of grievances.

My exploration of the controversial questions posed by the acceptance or the rejection of *Cutler-Hammer*, but neglected by the Court, would be misunderstood if it were taken as criticism of the Court's repudiation of that doctrine. Repudiation seems justifiable, but not because it reflects the parties' purposes. On the contrary, the uncertainty as to those purposes required the Court to choose between the risks of arbitral autonomy and those of judicial intervention. A fully informed choice would presuppose a careful compara-

<sup>46</sup> See note 16 *supra* and accompanying text.

tive study of the quality of judicial and arbitral determinations under labor agreements. But such studies do not, to my knowledge, exist, are beyond the resources of the Court,<sup>47</sup> and would, in any event, involve difficulties because of the absence of generally accepted criteria for testing the quality of adjudication. In the absence of such comparative studies, it was appropriate for the Court to give weight to competent studies of judicial intervention<sup>48</sup> which stressed the difficulties involved. Here, as in other contexts, the Court, and commentators, may take comfort in Samuel Butler's observation that "life is the art of drawing sufficient conclusions from insufficient premises."

Even those who applaud the Court's rejection of *Cutler-Hammer* may have doubts about the additional requirement that the opponent of arbitrability establish his case "with positive assurance." This rule is apparently to apply to all standard clauses "in the absence of any express provision excluding a particular grievance from arbitration." Consensual considerations scarcely support such an onerous requirement. If the parties gave any thought to the burden of persuasion, they, or one of them, presumably would have relied on the law of commercial contracts, which requires the proponent of arbitrability to establish the breach of an agreement to arbitrate.<sup>49</sup> It is true, as the Court emphasized,<sup>50</sup> that there are important differences between commercial and labor arbitration. But such differences would not have foreclosed reliance by the parties on a close, if imperfect, analogy. It is also true that the allocation and the weight of the burden of persuasion generally reflect policy, rather than consensual, considerations. Thus it is arguable that the Court's rule was justified by its view that an autonomous system of arbitration is good for the parties. But in the context of labor arbitration there is a legislative obstacle to the Court's implementing its policy preferences through the imposition of extraordinary procedural burdens. Congress, reflecting the general commitment to free collective bargaining, declared only that voluntary arbitration, and not all grievance-arbitration, is desirable.<sup>51</sup> Furthermore, the parties' voluntary acceptance of arbitration for most unsettled grievances tells us precious little about their attitudes with respect to extraordinary grievances which may activate the defense of non-arbitrability. These considerations suggest that a

<sup>47</sup> Cf. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 76-77, *passim*. See also note 17 *supra*.

<sup>48</sup> See note 37 *supra* and accompanying text. Cf. Karst, *supra* note 47 at 105.

<sup>49</sup> See authorities cited in the dissent of Whittaker, J., in *Warrior*, 363 U.S. at 586-87. Cf. Magruder, J., in *Local 149, American Fed'n of Technical Eng'rs v. General Elec. Co.*, 250 F.2d 922, 927 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958): "[W]hen one of the parties needs the aid of a court, and asks the court for a decree ordering specific performance of a contract to arbitrate, we think that the court, before rendering such a decree has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken this promise."

<sup>50</sup> 363 U.S. at 567; 363 U.S. at 578.

<sup>51</sup> See LMRA, § 203(d), 61 Stat. 153 (1947), 29 U.S.C. § 173(d) (1958).

rule demanding, in effect, proof beyond a reasonable doubt by the opponent of arbitrability is immoderate.

In addition to the general rules, which I have examined, the Court made sweeping and troublesome pronouncements about no-strike clauses, labor agreements and labor arbitration. The elusive overtones of those pronouncements are perhaps the most disturbing aspects of these cases.

As to no-strike clauses, the Court announced in *American Manufacturing*: "There is no exception in the no-strike clause and none, therefore, should be read into the grievance [*sic*, arbitration?] clause, since one is the *quid pro quo* for the other."<sup>52</sup> And in *Warrior*: "A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes."<sup>53</sup>

The *quid pro* argument, which harks back to *Lincoln Mills*,<sup>54</sup> is based on the assumption that an arbitration clause and a no-strike clause are traded one for the other. But that assumption ignores that each of these clauses is merely one element of a total negotiating package.<sup>55</sup> Moreover, and more important, the Court ignores that an agreement is often designed to insulate some managerial decisions against both arbitration and strikes. Management may consider that only such dual protection will assure the stability and the freedom in some areas which management may seek through the agreement. The LMRA<sup>56</sup> also seeks to promote such stability by proscribing economic pressure directed at contract modification during the term of the agreement and, contrary to the passage from *Warrior* quoted above, such proscription is wholly independent of the scope of the parties' no-strike agreement.

<sup>52</sup> 363 U.S. at 567.

<sup>53</sup> 363 U.S. at 583. The Court also stated: "Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the '*quid pro quo*' for the agreement not to strike. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455." *Id.* at 578 n.4. But cf. Fulda, *The No-Strike Clause*, 21 GEO. WASH. L. REV. 127, 155-57 (1952), reporting on situations where both labor and management have expressed a contrary judgment in connection with sensitive issues, such as production standards.

<sup>54</sup> See note 53 *supra*.

<sup>55</sup> Cf. *Lewis v. Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958) (Strike to settle a dispute which collective agreement provides shall be settled by exclusive grievance-arbitration procedure violates the agreement despite another contractual provision expressly superseding a previous no-strike clause). An evenly divided Court affirmed this holding. 361 U.S. 459, 464 (1960).

<sup>56</sup> Section 8(d)(4), 61 Stat. 601 (1947), 29 U.S.C. 160 (d)(4) (1958); the interpretive issues raised by this section are considered in *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952).

That passage from *Warrior* involves an additional difficulty—it implies that a no-strike clause protects management against strikes only if it takes action not prohibited by the agreement. But this implication must have been unintended because it ignores that arbitration (or the judiciary) is available to remedy management's departures from the agreement. In any event, regardless of the existence or the scope of a no-strike clause, everything that management does is subject to the agreement in the sense that the agreement and its implications either permit or prohibit managerial action.

The Court's exegesis as to no-strike clauses, because it is so puzzling and is linked to an expansive view of arbitrability, will give rise to speculations<sup>57</sup> that the Court implied that the arbitration clause and no-strike clause must be considered to be coextensive. Such a rule, as a guide in resolving ambiguities in either clause, is implicit in the Court's approach and is desirable. But it seems clear that the Court has not gone further and imposed an inflexible requirement of corresponding coverage for each of these two clauses. On the contrary, the Court made it plain that clear and specific limitations on arbitration clauses will be respected in actions arising under section 301.<sup>58</sup>

The impact on section 8(a)(5) of the Court's coupling of no-strike and arbitration clauses is somewhat more uncertain. *American Insurance*<sup>59</sup> intimated that section 8(a)(5) of the LMRA does not prohibit an employer from bargaining for both a limited arbitration and a broad no-strike clause. But in *Cummer-Graham Co.*<sup>60</sup> the NLRB recently approved a finding by a trial examiner (who had invoked *Lincoln Mills*) that an employer had violated section 8(a)(5) by insisting on a no-strike clause (with money penalties) while rejecting arbitration *in toto* and demanding final employer determination of grievances. The Fifth Circuit reversed, holding that the employer's position did not even constitute evidence of bad faith.<sup>61</sup> *Cummer-Graham*, which also involved extensive dilatory and obstructive bargaining tactics by the employer, is a far cry from the limited qualifications on arbitration discussed by the Court in the instant cases. Furthermore, those cases, which did not even mention the issue of good faith bargaining, have contradictory implications as to that issue. The Court's emphasis on the consensual nature of arbitration, coupled with its insistence that exemptions from arbitration be clear, implies that an employer may, without violating section 8(a)(5), seek such exemptions

<sup>57</sup> Management lawyers in the audience expressed such fears.

<sup>58</sup> Text accompanying notes 24–26 *supra*.

<sup>59</sup> NLRB v. American Insurance Co., 343 U.S. 395, 408 n.22 (1952). Three justices dissented without, however, suggesting that section 8(a)(5) required any particular relationship between the respective coverage of the two clauses.

<sup>60</sup> 122 N.L.R.B. 1044, 1072 (1959).

<sup>61</sup> NLRB v. Cummer-Graham Co., 279 F.2d 757, 759–60 (5th Cir. 1960).



while also demanding a broad no-strike clause.<sup>62</sup> On the other hand, the Court's emphasis on the interdependence of arbitration and no-strike clauses and on the desirability of broad and reciprocal coverage in such clauses, may be invoked in support of the position that bargaining demands inconsistent with such interdependence are per se violations of section 8(a)(5) or section 8(b)(3) or at least evidence of such violations.

Such a position under the extreme circumstances which the Board found in *Cummer-Graham* is appealing, but Board doctrines provoked by extreme cases tend to proliferate into detailed regulations of the bargaining process and of bargaining demands. Such regulation has been forcefully criticized<sup>63</sup> as placing an undue premium on the rhetoric of bargaining, as ignoring the problems distinctive to particular relationships, and as fundamentally incompatible with the general policy of leaving the terms of agreements to private persuasion and power. These considerations are weighty reasons against the Board's resorting to sections 8(a)(5) and 8(b)(3)<sup>64</sup> to compel reciprocity with respect to demands for arbitration clauses and no-strike clauses, respectively. The ambivalent language in *Warrior* and *American Manufacturing* scarcely affords respectable support for such compulsion.

The Court's essay on the labor agreement and labor arbitration, was as unnecessary and as troublesome as its treatment of no-strike clauses. That essay, in my view, is extravagant in its emphasis on the uniqueness of the labor agreement, the mysteries of labor arbitration, and the activism which parties are universally supposed to expect from arbitrators.

The agreement, writes Mr. Justice Douglas, "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. [It] covers the whole employment relationship. It calls into

<sup>62</sup> The concurring opinion, although not addressed specifically to section 8(a)(5), emphasized this, "for the arbitration promise is itself a contract. The parties are free to make that promise as broad or narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreement." 363 U.S. at 570. Later, the concurring opinion declared: "I do not understand the Court to mean that the application of the principles announced today depends upon the presence of a no-strike clause in the agreement." *Id.* at 573.

<sup>63</sup> See generally, Cox and Donlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950); Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1077-86 (1958). Cf. Meltzer, *The Chicago & North Western Case: Judicial Workmanship and Collective Bargaining*, 1960 SUP. CT. REV. 113, 127 n.61.

<sup>64</sup> The Board's reasoning in *Cummer-Graham*, 122 N.L.R.B. 1044 (1959), implies that a union would violate Section 8(b)(3) of the LMRA by insisting on a broad grievance-arbitration procedure while resisting a broad no-strike clause. Any attempt to apply such an approach would involve the Board in the impossible task of dealing with a broad range of limitations on no-strike clauses. For an indication of the variations in such clauses, see Wolk & Nix, *Work Stoppage Provisions in Union Agreements*, 74 MONTHLY LAB. REV. 272 (1952); Fulda, *supra* note 53, at 153.

being a new common law—the common law of a particular industry or of a particular plant.”<sup>65</sup> It reflects the compulsions on the parties to deal with each other and their attempt to establish the rule of law for what would otherwise be a regime of power:

Arbitration is a means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. . . . The labor arbitrator performs functions which are not normal to the courts. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the . . . agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance because he cannot be similarly informed.<sup>66</sup>

In *Enterprise Wheel*, the Justice elaborates on this theme by a quotation emphasizing the otherworldly characteristics of the plant.<sup>67</sup>

Mr. Justice Douglas seems to be saying that the law for the labor agreement should be divorced from the general law of contracts<sup>68</sup> because the labor agreement is *sui generis* and the problems of labor arbitration are so esoteric. But the *sui generis* label, which is equally applicable to a large variety of agreements, surely does not answer the question of what insights built into the general law are relevant for the development of the law of the labor agreement. Indeed, it is worth remembering that the general tradition has supplied much of the rhetoric surrounding the labor agreement and has called for interpretation responsive to the distinctive functions of such agreements. Thus, the now modish rhetoric that labor agreements are constitutions had its parallel in well-aged discussions of other forms of agreement.<sup>69</sup> And surely,

<sup>65</sup> 363 U.S. at 578.

<sup>66</sup> *Ibid.*

<sup>67</sup> “Persons unfamiliar with mills and factories—farmers or professors, for example—often remark upon visiting them that they seem like another world. . . . The newly hired employee, the ‘green hand,’ is gradually initiated into what amounts to a miniature society. There he finds himself in a strange environment that assaults his senses with unusual sounds and smells and often with different ‘weather conditions’ such as sudden drafts of heat, cold, or humidity. He discovers that the society of which he only gradually becomes a part has of course a formal government of its own—the rules which management and the union have laid down—but that it also differs from or parallels the world outside in social classes, folklore, ritual, and traditions.” *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596–97 (1960). Professors, of course, arbitrate a large bulk of the disputes arising in the strange world of industry.

<sup>68</sup> In support of his views, Mr. Justice Douglas (363 U.S. at 579) quoted from Professor Cox’s article (*supra* note 18, at 1498–99), but ignored Cox’s balanced suggestion (*id.* at 1485–89) that the judge-made law of contracts, administered in the light of the distinctive problems and purposes of labor agreements, can illuminate the solution of the legal and arbitral problems arising under such agreements.

<sup>69</sup> See Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 706 (1931).

it is scarcely necessary any longer to elaborate on the judicial tradition which stresses context, purposes, consequences, and need in resolving the ambiguities and gaps which creep into an almost infinite variety of commercial contracts,<sup>70</sup> as well as labor agreements. The relevance of that tradition to problems arising under labor agreements was recently underscored by Mr. Justice Frankfurter, who declared:

Underlying the Court's view is the assumption that the law of contracts is a rigorously closed system applicable to a limited class of arrangements between parties acting at arm's length, and that collective bargaining agreements are a very special class of voluntary agreements to which the general law pertaining to the construction and enforcement of contracts is not relevant. As a matter of fact, the governing rules pertaining to contracts recognize the diversity of situations in relation to which contracts are made and duly allow for these variant factors in construing and enforcing contracts. And so, of course, in construing agreements for the reciprocal rights and obligations of employers and employees, account must be taken of the many implications relevant to construing a document that governs industrial relations. There is no reason for jettisoning principles of fairness and justice that are as relevant to the law's attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with other affairs, even giving due regard to the circumstances of industrial life and to the libretto that this furnishes in construing collective bargaining agreements.<sup>71</sup>

Perhaps it was insufficient attention to these modulated observations which resulted in an opinion which may invite unsophisticated arbitrators to try to improve, rather than interpret, the parties' bargain. But, it should be noted, the Court's invitation is unclear and ambivalent. It is only "*insofar as the contract permits*" that, according to *Warrior*, the parties expect the arbitrator to consider "such factors as the effect upon productivity of a particular result, its consequences to . . . morale . . . , whether tensions will be heightened or diminished."<sup>72</sup> The parties may expect all this, but one or both of them will forcefully urge that one purpose of the agreement was to avoid, or at least to limit, the need for appraisal of such sensitive variables by outsiders and especially *ad hoc* arbitrators, whose knowledge about any particular plant often comes solely from a relatively short hearing and whose responsibility ends with the award. Indeed, the Court seemed to sense the possibility that the *Warrior* opinion might stimulate too much free thinking by arbitrators. In the last of the three cases, *Enterprise Wheel*,<sup>73</sup> it stressed the restraints on personal statesmanship imposed by the orthodox faith. In the end, the Court,

<sup>70</sup> See HOLMES, *THE COMMON LAW*, 300, 303 (1923), and comments by Llewellyn, *supra* note 69, at 746 n.86.

<sup>71</sup> Dissenting in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 475-76 (1960).

<sup>72</sup> 363 U.S. at 582. (Emphasis added.) For a review of the long-standing controversy about the proper role of the arbitrator, see SMITH, *LABOR LAW, CASES AND MATERIALS* 895-97 (2d. ed. 1953).

<sup>73</sup> *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); see text accompanying note 86 *infra*.

despite its splendid rhetoric about the uniqueness of labor arbitration, restored it to the universe of the contract.

Unlike its two companions, *Enterprise Wheel* arose from an action to enforce an award. The pertinent agreement contained a standard clause providing for arbitration of "differences as to meaning and application." It also provided for reinstatement and back pay for employees disciplined or discharged without just cause. The employer had refused to arbitrate a grievance contesting the discharge of eleven employees for walking out to protest the discharge of another employee. About seven months after the discharges and four months after the expiration of the agreement, which had not been renewed,<sup>74</sup> the union filed an action in a federal district court, which ordered arbitration. The arbitrator, holding that a ten-day suspension was the maximum penalty justifiable, awarded reinstatement and back pay (including pay which would have been earned after the expiration of the agreement) minus ten days' pay and outside earnings. Subsequently, the federal district court directed the employer to comply with that award. The court of appeals reversed as to the award of reinstatement and back pay for the period after the expiration date of the agreement and was in turn reversed by the Court,<sup>75</sup> with Mr. Justice Whittaker dissenting.

Before turning to the Court's general approach, a word about the particular decision is in order. The obstacle to enforcement considered decisive by both the court of appeals<sup>76</sup> and Mr. Justice Whittaker<sup>77</sup> was that the award had extended contract obligations beyond the contract term. Without such extension, the grievants' employment, Mr. Justice Whittaker urged, became an at-will relationship upon the expiration of the agreement; thus the discharge became privileged at that time.

The foregoing argument, which was not discussed by the Court, is not free from substantial difficulties. If the award had been rendered prior to the contract's expiration date, the employer's discharge authority would have been subject to substantial extra-legal restraints. The union, despite the absence of a renewal agreement, had retained its majority status and might well have organized economic reprisals, or such reprisals might have occurred spontaneously. Furthermore, the employer might have considered it improper to

<sup>74</sup> See *Enterprise Wheel & Car Corp. v. United Steelworkers*, 269 F.2d 327, 329 (4th Cir. 1959).

<sup>75</sup> The Court, without discussing the question, affirmed jurisdiction under section 301, even though the rights being asserted were "personal" to the employees. *Cf. Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955). The trial court had found *Westinghouse* inapposite, at least where an award in favor of individual employees resulted from judicially compelled, as opposed to voluntary, submission. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 168 F. Supp. 308, 309 (S.D. W. Va. 1958). See generally Meltzer, *The Supreme Court, Congress and State Jurisdiction over Labor Relations: II*, 59 COLUM. L. REV. 269, 270-72, n.201 (1959).

<sup>76</sup> See 269 F.2d at 331.

<sup>77</sup> See 363 U.S. at 600-02.

discharge for a reason previously adjudicated as insufficient. Consequently, in the hypothetical situation, a timely remedy for the employer's wrong might have preserved the grievants' jobs beyond the expiration of the agreement.<sup>78</sup> The post-expiration award, like an award during the contract term, was designed to restore to the wronged employees the status they might have enjoyed but for the employer's breach, first, in discharging them and secondly, in violating his obligation to arbitrate.<sup>79</sup>

It is true that the lapse of time and the termination of the agreement interposes a "technical" obstacle to the restoration of the employees' status. But those factors are accidental, rather than essential, from the employees' point of view. The reality, especially painful to older employees such as those involved in *Enterprise Wheel*<sup>80</sup> is that they are out of a job, perhaps because of the employer's misconduct. Since the general purpose of arbitration in wrongful discharge cases is restoration of the status quo, a substantial argument can be made that the *Enterprise Wheel* award was within the purpose implicit in the remedial provision of the agreement. Although that argument presupposes that the relevant contingencies would have developed favorably for the employees, such a presupposition in favor of the wronged party is justifiable.

The forgoing argument fails to resolve an important question, which was not mentioned by the majority or the dissent, or the arbitrator: What protection against discharge do the grievants have after reinstatement? To apply a just-cause standard would be to extend a contract obligation for an indefinite period after the expiration of the agreement. On the other hand, to recognize the employer's unlimited right to discharge immediately after reinstatement would permit him to nullify the reinstatement award and the enforcement order. This dilemma could be resolved by recognizing the employer's right to discharge, subject only to the limitation that the discharge should not be prompted by the conduct already adjudicated by the arbitrator. This solution is not ideal, since it makes the propriety of any future discharge turn on the employer's motivation. But motive is often a decisive factor in both labor arbitrations and NLRB proceedings. Indeed, the suggested solution is similar to that adopted by the Second Circuit in its first decision in the celebrated *Universal Camera* case.<sup>81</sup>

<sup>78</sup> A similar argument was invoked by the district court in enforcing the award. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 168 F. Supp. 308, 312 (S.D. W.Va. 1958).

<sup>79</sup> *Ibid.* The union filed a grievance six days after the discharges. See Record, Appendix to Appellee's Brief, p. 18.

<sup>80</sup> The district court was apparently moved by this factor, stating: "The Court is informed that the men involved here are somewhat elderly men, to whom seniority is of utmost importance and to whom back wages are only a comparatively incidental factor. The reinstatement is the moving factor of the union's interest and right in this case." 168 F. Supp. at 312.

<sup>81</sup> *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950), *rev'd on other grounds*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

The importance of *Enterprise Wheel* lies, not in the decision, but in the broad remedial authority granted to arbitrators. The Court declared: "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency."<sup>82</sup>

But, the opinion continues,<sup>83</sup> the agreement "could have provided" that the remedy for wrongful discharge should be reinstatement and back pay for the period after the agreement terminated; therefore, the arbitrator had the authority to determine whether the agreement should be so construed. To hold that the remedy was barred because the agreement did not provide for it would be unacceptable. That view "would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract"<sup>84</sup> and such review would involve the "fundamental error" condemned in *American Manufacturing*.<sup>85</sup> Consequently, insofar as the "arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."<sup>86</sup>

The only limitation on the arbitrator's remedial power which the Court explicitly recognizes is found in the following passage:

Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. *When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.*<sup>87</sup>

At first glance, the foregoing passage might be read as implying that the courts are to see to it that an award "draws its essence" from the agreement. But a closer look suggests a much narrower judicial limitation on the arbitrator's autonomy, that is, a limitation which does no more than regulate the rhetoric of his award. Thus the italicized sentence suggests that the arbitrator's remedial action is not to be disturbed provided that his award purportedly rests on the agreement. It is only when his "words," as opposed to his result, manifest an infidelity to the agreement that judicial enforcement is to be denied. Furthermore, when as in *Enterprise Wheel* itself, it is not clear from the arbitrator's words whether he based the award on the agreement,

<sup>82</sup> 363 U.S. at 597.

<sup>83</sup> *Id.* at 598.

<sup>84</sup> *Id.* at 598-99.

<sup>85</sup> *Id.* at 599.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Id.* at 597. (Emphasis added.) This passage follows immediately after the language quoted in text accompanying note 82 *supra*,

the ambiguity must be resolved in favor of enforcing the award. To require arbitrators to write unambiguous opinions, Mr. Justice Douglas fears,<sup>88</sup> would discourage the writing of any opinions—a result that would be undesirable because a well-reasoned opinion promotes confidence in arbitration and clarifies the agreement.

The Court's general approach to the arbitrator's remedial authority dovetails with its approach to his interpretation of substantive provisions of the agreement announced in *American Manufacturing*. The arbitrator may, without judicial challenge, formulate remedies not provided by the contract. Furthermore, under a literal interpretation of the Court's language, a court should not upset arbitral remedies which it deems to be proscribed by the agreement, so long as the arbitrator has based the remedy on contractual language. Otherwise, judicial denial of enforcement would necessarily involve a forbidden consideration of the merits.

The Court thus appears to reject a familiar suggestion, that a concept of primary jurisdiction should apply to judicial action impinging on labor arbitration. Under this suggestion, the judicial role would be more expansive in enforcement actions than in actions to compel arbitration.<sup>89</sup> The basis for this difference is that at the enforcement stage courts would have the benefit of the expertise imputed to the arbitrator. But a primary jurisdiction approach, despite its appeal, cannot be derived from the parties' bargain, which is the ostensible justification for the Court's distribution of power between arbitrators and courts. Nor is such an approach consistent with the Court's position in *American Manufacturing* and *Enterprise Wheel*. That position means, at least under a standard arbitration clause, that the question for the court before an award is whether the union's words claim a violation of the agreement. In the enforcement action a similar question is before the court—whether the arbitrator asserts that his remedy and, presumably, the substantive obligation it implements, are based on the agreement. Thus, both before and after an award, an *ipse dixit* appears to afford invulnerable protection against judicial interference with arbitral autonomy in applying the agreement.<sup>90</sup> Nevertheless, if arbitrators should award novel and drastic remedies, it would not be surprising if the Court limited its grant of remedial autonomy.

The three cases, read together, sanction a striking conscription of judicial power. The lower courts are commanded to exercise their equitable powers, notwithstanding their own conviction that there is no rational basis in the

<sup>88</sup> See 363 U.S. at 598.

<sup>89</sup> Such a provision was embodied in the proposed Uniform Arbitration Act. See Justin, *Arbitrability and the Arbitrator's Jurisdiction*, in *MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS* 10 (1956).

<sup>90</sup> Judicial power to deny arbitrability on grounds independent of interpretation, such as the invalidity of the agreement or repugnance of particular provisions to public policy, is not affected by these cases. Similarly, judicial power to vacate an award on such grounds, or on grounds of denial of a fair hearing, is unaffected.

parties' agreement either for recourse to arbitration or for the resultant award. This result is reminiscent of the late Dean Shulman's admonition that the law—but not the lawyers—should stay out of arbitration.<sup>91</sup> The Court's authority and influence may be adequate to keep the law out while the judges stay in. But such an attempted insulation of judges from judicial traditions has built-in weaknesses, which probably will be exposed by subsequent litigation over the limits of the Court's approach in these three cases.

That approach does not, of course, compel the parties to accept the Court's view of the blessings of arbitral autonomy. The Court merely required, as a foundation for increased judicial supervision, contract clauses implementing that purpose clearly—or very clearly.<sup>92</sup>

The vigor with which management will press for restrictive clauses,<sup>93</sup> and the resistance and the number of strikes which may result, are, of course, conjectural. All that is clear is that generalizations as to the effect of the Court's approach on bargaining would not be fruitful since the consequences will vary with the bargaining relationships.

Where the collective bargaining relationship is established and the union secure, and where arbitration has worked reasonably well, it is doubtful that employers will seek to modify a standard clause. Such modifications would be of major practical importance only if one of the parties contemplated judicial tests of the arbitrator's powers. Such tests have, however, been infrequent for several reasons: First, if a grievance is so weak as to permit a persuasive claim of non-arbitrability, the risk that an arbitrator will sustain the grievance on its merits is correspondingly reduced. Secondly, recourse to the courts disturbs the continuing relationship and may stir up the employees, especially if the union wishes to exploit the situation for that purpose. Finally, the drafting of effective restrictions on arbitral autonomy now involves increased and formidable difficulties.<sup>94</sup> These factors suggest that employers are likely to

<sup>91</sup> See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955).

<sup>92</sup> But cf. the discussion of Section 8(a)(5) of the LMRA, notes 59–63 *supra* and accompanying text.

<sup>93</sup> Such clauses include (1) narrow definitions of grievances, (e.g., restricting grievances to claims alleging violations of express and specific provisions of the agreement, and thereby seeking to exclude claims based on "past practices" or on broad implications from recognition and seniority clauses); (2) specific exclusion clauses barring arbitration of managerial conduct in certain sensitive areas, without regard to claims of management's bad faith or to claims that action within the excluded area violated contractual provisions; (3) provisions making a variation of *Cutler-Hammer* the test of arbitrability; (4) specification of, and restrictions on, remedial authority. Any effort to incorporate such clauses would obviously complicate negotiations. Furthermore, the moral basis for union opposition to such demands will be strengthened by the Court's strong endorsement of arbitral autonomy and by its coupling of the no-strike and arbitration clauses. Finally, specific restrictions on arbitration and on arbitral remedies, unless they are comprehensive in coverage, are likely to activate the *inclusio-unius* argument.

<sup>94</sup> See note 93 *supra*.



shrink from multiplying negotiating issues by insistence on clauses which are of uncertain effectiveness and which, in any event, make a difference only when both the union and a mutually appointed arbitrator adopt outrageous positions.

Where a union is negotiating its first agreement with a newly unionized enterprise, the impact of the Court's approach on negotiations may be more substantial. It is at this stage that mutual fear and distrust and the desire to preserve (or to share) sovereignty are at their height. Here also, the union, especially if it promised much during an organizing campaign, may be reluctant to rock the boat by strikes over non-money issues. Employers, concerned about the Court's sweeping language and its flirtation with arbitral activism, may press for clauses limiting arbitration and expanding judicial control.

It would be ironic if the Court's immoderate eulogy of arbitration were to operate to limit its use in the newly organized plant or in plants where labor and management have not achieved a workable accommodation. It is in such plants that day by day adjustments may be especially difficult and that arbitration may be especially useful. It is not too much to hope that the good judgment of the parties and of arbitrators will avoid crippling limitations on an institution which is a constructive adjunct to collective bargaining even though it is not free from imperfections associated with other earthly forms of adjudication.